

**U.S. Department of Labor**

**Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, D.C. 20001-8002**



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Date Issued: **January 22, 2001**

Case No.: **2000-INA-76**

CO No.: **P1999-MD-03323539**

*In the Matter of:*

**HUDD DISTRIBUTION SERVICES**

Employer,

*on behalf of:*

**AGUSTIN TORRES**

Alien.

Appearance: Jean-Pierre Karnos, Esq.  
for Employer and Alien

Certifying Officer: Rebecca Marsh Day  
San Francisco, CA

Before: Burke, Vittone and Wood  
Administrative Law Judges

**DECISION AND ORDER**

***Per Curiam.*** This case arises from the employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212 (a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. This decision is based on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27(c).

## STATEMENT OF THE CASE

On May 15, 1995, Hudd Distribution Services (“Employer”) filed an application for labor certification to enable Agustin Torres (“Alien”) to fill the position of warehouse supervisor. (AF 14). The job duties for the position are:

The occupant of this position will perform the tasks of supervising and coordinating the activities of workers engaged in the receiving, storing and transportation of materials and products. Will apply knowledge of plant arrangement, equipment and procedures. Said occupant will study shipping and receiving notices and summary of warehouse space available to develop plan layout for material handling. The occupant of this position will verify records of shipping and receiving, routing plans and warehouse load capacity.

*Id.* Two years of experience in the job offered was required. *Id.*

On November 24, 1998, the CO issued a Notice of Findings (“NOF”) proposing to deny certification on several grounds. (AF 9-12). The CO indicated that 11 U.S. applicants had been rejected for other than lawful, job-related reasons; and that Employer’s recruitment effort was not in good faith. (AF 10). The CO explained that Employer could rebut these findings by: (1) explaining with specificity, the lawful, job-related reasons for not hiring each qualified U.S. worker, and give the job title of the person who considered them for employment; and (2) submit documentation giving detail of its attempt(s) to interview U.S. applicants. Positive contact efforts include both attempts in writing (supported by dated return receipts) and by telephone (supported by telephone bills). *Id.*

Employer’s rebuttal, submitted through counsel, was dated December 11, 1998. (AF 6-8). Employer explained why 10 U.S. workers were rejected and contended that sufficient recruitment efforts were made, as applicants were timely contacted; however, Employer failed to address Applicant Figueroa. (AF 8).

The CO issued a Final Determination (“FD”) denying certification on June 11, 1999. (AF 4-5). The CO found that Employer’s explanations regarding the rejection of 11 U.S. applicants did not comply with regulations. *Id.* Employer failed to rebut the finding regarding Applicant Figueroa. Employer found two applicants overqualified, found one untruthful because Employer was unable to confirm his references, and found two other applicants “lacking confidence” and being “unstable.” *Id.* The CO noted that these were not job-related reasons. The CO also found that while Employer demonstrated one part of a good faith recruitment effort, demonstrated by Employer’s timely contact of the applicants after receiving résumés, Employer scheduled interviews more than a month after receiving résumés and set the interviews so far into the future that the applicants may lose interest in the job opportunity, which does not demonstrate a good-faith recruitment effort. *Id.* From these findings, the CO concluded that the application remained in violation of the Federal regulations and accordingly, denied labor certification.

Employer has requested a review of the denial and the record has been submitted to the Board of Alien Labor Certification Appeals (“Board”) for such purpose.

### **DISCUSSION**

An employer must show that U.S. applicants were rejected solely for lawful job-related reason. 20 C.F.R. § 656.21(b)(6). Although the regulations do not explicitly state a “good faith” requirement in regard to post-filing recruitment, such a requirement is implicit. *See H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of a good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are “able, willing, qualified, and available” to perform the work. § 656.1.

In the present case, the CO found, *inter alia*, that Employer failed to sufficiently document such information in regards to Applicant Figueroa. The NOF found a lack of good faith recruitment in that Figueroa was subjected to a group interview which only lasted three to five minutes and consisted of one or two questions “mostly aimed at discouraging applicants from pursuing the job.” (AF 10). Accordingly, the CO clearly indicated in the NOF that Employer “must explain, with specificity the lawful job-related reasons for not hiring each U.S. worker referred, and give the job title of the person who considered them.” Employer submitted nothing in response. In fact, Employer still failed to address the basis for rejecting Applicant Figueroa in its brief before the Board.

It is well settled that an employer must rebut all findings of the NOF, or those findings will be deemed admitted. § 656.25(e). *See also, Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*); *Tarna of California*, 1988-INA-478 (June 6, 1989). Employer failed to rebut the finding of the NOF that Employer did not have a lawful, job-related reason for rejecting Applicant Figueroa, and thus its application must be denied. Accordingly, the following order shall enter:

### **ORDER**

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED**.

**SO ORDERED.**

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TODD R. SMYTH  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will

become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decision, and (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400  
Washington, DC 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition, the Board may order briefs.